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The Constitutionality of California's Marketing Orders on Head Lettuce in the Light of *Parker v. Brown*

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Notes and Comments

CONSTITUTIONAL LAW: THE CONSTITUTIONALITY OF CALIFORNIA'S MARKETING ORDERS ON HEAD LETTUCE IN THE LIGHT OF *Parker v. Brown* (1943).

Throughout the years, the Supreme Court has under numerous circumstances found justification for a state's interference with interstate commerce.¹ A good basic analysis of the rationale behind such decisions may be found in *Breard v. City of Alexandria, La.*, in which the court stated:

State regulations of commerce are to be sustained . . . because upon consideration of all relevant facts and circumstances it appears that the matter regulated is one which may be appropriately regarded in interest of safety, health and welfare of local communities and which because of its local character and practical difficulties involved may never be adequately dealt with by Congress.²

However, in *Parker v. Brown*,³ the Court adopted a new and different justification for a state's regulation of interstate commerce. It was there held that a California marketing order to conserve the agricultural wealth of the state and to prevent economic waste in the marketing of agricultural products of the state was constitutional even though it had consequential effects on the volume and value of interstate commerce. A marketing order that solved a local agricultural problem in an area where nation-wide legislation was neither called for nor justified and which produced economic and consequential social benefits was found constitutional. Thus, the question is posed: can a similar marketing order applied to a different crop—head lettuce—be justified when it is clear that the problem involved is not purely local and that said regulations have not produced economic or social benefits?

A marketing order as it exists in California may have numerous attributes and functions. It may be a per-package-assessment on the producers of a certain crop, said assessment to be used to promote sales through nation-wide advertisement. Or it may be a device used to control the volume of a certain crop in hopes of maintaining a satisfactory price by making the supply of the commodity equal to the demand for it. Marketing orders also often contain quality-control provisions. The marketing order applied in

¹ *Duckworth v. Arkansas*, 314 U.S. 390 (1941); *People v. Thompson*, 313 U.S. 109 (1941); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938); *Minnesota Rate Case*, 230 U.S. 352 (1913).

² *Breard v. City of Alexandria*, 341 U.S. 622, 635 n. 19 (1951), citing *Parker v. Brown*, 317 U.S. 341 (1943).

³ *Parker v. Brown*, *supra* note 2.

Parker v. Brown was a volume-control device applied to the California raisin crop. A quality standard was also incorporated in the order as a means of controlling volume as well as standards.⁴ In contrast, California's marketing orders on head lettuce are primarily volume-control devices and only secondarily employed for quality control.⁵ This was due to California's pre-existing high grading standards on head lettuce.⁶ The marketing order on raisins as analyzed in *Parker v. Brown* was upheld on the grounds that there was only a local problem involved that could best be handled by state level legislation, and that such legislation produced economic and consequential social benefits. However, when these same standards are applied to the California marketing orders on head lettuce their existence cannot be justified.⁷

The economic plight of lettuce producers is not a problem confined within the borders of California. Twenty-one states ship lettuce in appreciable amounts in interstate commerce,⁸ California and Arizona accounting for the major portion of the nation's production.⁹ California, however, during certain periods of the year produces less than twenty per cent of the national volume, while other areas during the same period make available over fifty per cent of the lettuce.¹⁰ Further, Canada and Mexico during certain seasons also grow lettuce and transport it into the United States market.¹¹ The development of farming in Mexico looms on the horizon as a formidable threat to California as well as United States agriculture.¹² In farming areas which produce cucumbers, egg plant, peas, peppers, string beans, squash, tomatoes and strawberries, Mexican agricultural advancements have already made their existence felt.¹³ Now that Mexico has expanded into the growing of

⁴ *Ibid.*

⁵ Marketing Order for Summer Head Lettuce, Effective January 29, 1960; amended by minor amendments effective October 2, 1961.

⁶ 3 CAL. ADM. CODE §§ 1436-1436.4.

⁷ There are two marketing orders on head lettuce, Summer Head Lettuce and Winter Head Lettuce.

⁸ California, Arizona, Texas, Florida, New Jersey, Ohio, Colorado, New York, Michigan, Wisconsin, New Mexico, Maine, Massachusetts, Connecticut, Rhode Island, Pennsylvania, Virginia, Kentucky, Georgia, Indiana, Illinois.

Lettuce Special Movements Release; Summer Season, Fall Season, Late Fall Early Winter Season 1960, Winter Season 1961, Rail and Truck Movements by States and Districts by Weeks June 12, 1960 to April 1, 1961. Prepared by H. B. Wolters and H. E. Myers, Local Representatives, Federal Marketing News Service, Salinas and Sacramento, California.

⁹ *Ibid.*

¹⁰ Lettuce Special Movement Release, Late Fall Early Winter 1960, November 5, 1960 to November 27, 1960.

¹¹ *Ibid.*

¹² *Western Crop and Farm Management* Volume X number 3, March, 1961, page 54, "And in Conclusion."

¹³ *Ibid.*

head lettuce the problems of volume and quality control take on a true international flavor. Lettuce is also grown in every state for local consumption. It cannot be doubted that such local production has a substantial effect on the demand for interstate shipments. This local production is on the upturn principally in the southwestern, midwestern and northeastern sections of the nation. Population migrations as well as modern advances in agriculture have made such expansion possible.

The technological and agricultural advances are numerous. New strains of lettuce have been developed which can endure greater variances in temperature and require less time to reach maturity. Thus, areas which are not blessed with sustained periods of mild weather, and have avoided growing lettuce because of this, now find it quite easy and profitable to produce representative crops. Technological advances in the application of new commercial fertilizers have made possible the use of lands which were previously thought minerally inadequate. Insect damage and weed growth have been diminished by new sprays and insecticides, thus making possible higher yields of better quality lettuce. The construction of new dams and irrigation systems are the major factors leading to the diversification in lettuce growing. Especially in the southwest has this influx of water led to the establishment of new lettuce growing areas. The migration of California lettuce farmers into these new areas is also noteworthy, not to mention the part said farmers are playing in the development of these new lands. With the use of modern machinery and years of experience, these farmers make arid land fertile and productive in a short period of years. Further, the distance between producer and consumer has been made immaterial by the employing of vacuum-cooling methods and rapid transportation facilities.¹⁴

Thus through numerous modern advances, lettuce is no longer an industry associated solely with California or any other single state. Unlike raisins, which were the subject of the marketing order in *Parker v. Brown*, lettuce can be grown successfully in every corner of the United States. It is a nation-wide crop which produces nation-wide problems incapable of being properly administered by local legislation.

The marketing order, or prorate, involved in the *Parker* case, was designed to regulate the quantity and quality of raisins. California, having a climate suitable for the growing of raisins and being a major producer, was in a position where by regulating volume they could affect the price. This

¹⁴ Vacuum Cooling: A system whereby field heat is removed from lettuce after it has been cut and packaged. Lettuce in its shipping container is put into a cylinder and vacuumed. Thus all warm air is removed from the containers. Then the packages are refrigerated and shipped. This system has proven very successful in preserving the freshness of lettuce for over a week.

economically beneficial prorate therefore could be justified even though it had an adverse effect on interstate commerce.¹⁵

The California marketing orders on head lettuce, however, due to internal and external defects, have not proven economically beneficial. A general lack of cooperation on the behalf of other lettuce growing states has been one of the basic reasons for the ineffectiveness of the prorate. Other lettuce growing areas have refused to assist California in regulating production. Instead of instituting volume controls of their own to diminish lettuce production or at least provide for the maintenance of the *status quo*, outside areas have stood placidly by, doing nothing. Where the prorate has made possible a decrease in production, this inaction on the part of other states has allowed production increases. Thus, any decrease in supply made possible by the California prorate has been more than replenished by the overproduction in other areas. Consequentially, there is still an oversupply of lettuce and thus low-selling prices. The only accomplishment of the marketing order has been a decrease in California's share of lettuce production. Market and price stabilization have not been increased by any appreciable amount. External conflicts of interests, over which California has no control, have proven to be a major pitfall for the prorate.

The California marketing order has also been hampered by several internal defects in its means of application. As of this date, three methods have been employed in attempts to control the volume of lettuce harvested.

The first method was a quota system.¹⁶ Each California lettuce grower or packer was permitted to harvest only a pre-set amount of lettuce per week.¹⁷ This quota was determined by taking into account several variables. First a nation-wide survey would be taken to ascertain the amount of lettuce that would be ready for harvesting in other areas during the subsequent week.¹⁸ Then all California lettuce growers or shippers were required to state how many acres of lettuce they would have ready for harvest in the following week. The California farmers were also required to make an estimate of how many dozen heads they would cut per acre and convert this to a per cent of yield figure for submission to the board of agriculture.¹⁹ When all these figures and estimates had been compiled, quotas would be determined and allotted accordingly. A minimum quota was also set.²⁰ Under

¹⁵ *Parker v. Brown*, 317 U.S. 341 (1943).

¹⁶ *Marketing Order for Summer Head Lettuce*, art. III, § C, sub-section 1,b,(2).

¹⁷ *Marketing Order for Summer Head Lettuce*, art. III, § B (1)(2).

¹⁸ *Marketing Order for Summer Head Lettuce*, art. III, § A(1).

¹⁹ *Marketing Order for Summer Head Lettuce*, art. III, § D(1)(2)a,b,c.

²⁰ *Marketing Order for Summer Head Lettuce*, art. III, § C(1)d. On May 13, 1960 at an Advisory Board meeting this "Standard Operating Procedure" was adopted by the Director of Agriculture.

this, an allotment could be no less than six hundred and forty dozen per day.²¹

This system on paper seemed infallible, but when made operational it proved unfunctional. A per cent of yield was found to be impossible to accurately estimate. Further, there was a difficulty when farmers went back into previously declared fields for second cutting. A farmer, when declaring for his first cutting, would state an estimate of fifty per cent of yield. Then the next week he would again declare a per cent of yield, only this time for a second cutting, at fifty per cent. The third week he would again declare the same field, this time for the final cutting, again at fifty per cent of yield. As is obvious, the farmer had requested an allotment to cut one hundred and fifty per cent of his lettuce, and this request had been included in the calculations to determine his quota.

There is a reasonable explanation for these overestimations. The orders handed down by the prorate commission on the quota system were so ambiguous that no one clear rule could be drawn from them. Many farmers drawing their own conclusions from the orders made good faith overestimates as to their per cent of yield. Other farmers seeing ambiguity, and realizing its possibilities, purposely overestimated. Such a nebulous subject as the maturity of a head of lettuce is impossible to estimate; thus no one can accurately find the per cent of yield of a crop of lettuce until actual harvesting. Unless one looks at every grower's books or checks his shipping statements, there is no way to be sure whether he is abiding by his quota. This makes the policing of such a marketing order very difficult. Finally, with forty-nine other states growing lettuce, it is impossible to have an accurate estimate of the production of these outside areas, which is one of the major factors used in determining the weekly quotas. Due to these difficulties in application and policing, the prorate commission handed down its second volume-control device, a discing program.²²

²¹ "No handler who receives an allocation pursuant to the Marketing Order shall be prevented from harvesting and packing less than 320 standard cartons or 160 standard crates, or 640 dozen loose in bulk, during any calendar day of a specific harvesting and packing period. Such daily minimum quotas may be doubled provided the Handler harvests and packs on alternate days only." Exhibit A (4) "Standard Operating Procedure" Submitted to the Director of Agriculture, for approval, by the Summer Head Lettuce Advisory Board at meeting of May 13, 1960.

This order caused some trouble because it was not definite what was a standard crate. A standard crate could contain either three or four dozen heads of lettuce. If by standard crate was meant three dozen a grower packing three dozen crates would be allowed to cut 480 dozen. While all others would have a minimum of 640 dozen. If by standard crate was meant four dozen the use of the three dozen package has indirectly been prohibited.

²² "Bulletin" handed down by the Summer Head Lettuce Advisory Board June 22, 1961. "No handler shall harvest and pack from any field of head lettuce during the period beginning 12:01 A.M. Saturday June 24, 1961 to 12:00 midnight Saturday, July 1, 1961, until after

Under this discing program a grower was required to turn under up to twenty per cent of his crop before he could begin harvest.²³ This was accomplished by turning under alternating furrows at a one-to-four ratio. This method effectively decreased lettuce production and was much easier to police than the quota system. The trained eye at a glance could determine whether the discing order had been complied with. This device, however, also had numerous drawbacks. In determining what per cent would be disced, the commission would once again look at tentative California and outside production. Numerous times the statistics on the outside areas have proved innaccurate and caused unnecessary discing. Thus farmers have been forced to disc lettuce on Monday which they could have easily sold on Thursday. Any miscalculations where a discing program is involved are fatal — this is not true with the quota system. In harvesting lettuce there is usually a certain portion of the crop that is unmerchantable. This can range from four to forty per cent, or sometimes even higher. When a twenty per cent compulsory disc is added to this, a farmer is put in a precarious financial position. When twenty-three to forty-eight per cent of the crop is left in the field, it becomes difficult to make a profit unless selling prices are constantly above par. It costs just as much to plant, irrigate, thin, fertilize, hoe, and spray the twenty-three to forty-eight per cent he leaves behind as it costs to grow the fifty-two to seventy-seven per cent he actually harvests. Due to the external defects mentioned previously very seldom is the market price at such a level to compensate for the discing and plant failure losses. The discing system, therefore, is not financially beneficial. Further, the discing program is indiscriminate as to quality protection. Good and bad lettuce alike are disced under. This is a natural result of an alternate row discing arrangement. At least under the quota system a grower when he harvested would select his higher quality lettuce to fulfill his allotment.

The last and most unsuccessful volume control device employed under the lettuce prorate was a limitation on harvesting hours.²⁴ Under this order, lettuce growers were only allowed to harvest during a six-hour period each day. Within a week's time this device had to be discarded. The large lettuce growers by doubling their cutting crews were able to cut more lettuce in six hours than they would usually harvest in a whole day. Smaller farmers had labor problems. Cutting crews complained and went to picking other

two (2) beds of every ten (10) beds, three (3) beds of every fifteen (15) beds or four (4) beds of every twenty (20) beds of head lettuce are destroyed alternately and equally across the field of head lettuce to be harvested and the same proportions shall apply to the excess number of beds in any such field."

²³ *Marketing Order for Summer Head Lettuce*, art. III, § C(1)b,3.

²⁴ *Marketing Order for Summer Head Lettuce*, art. III, § C(1),b,1. This provision was enacted August 31, 1961.

crops because they found that they could not make enough to live on in a six-hour day. Thus the whole purpose of the measure was defeated and it had to be promptly discarded.

Another major defect of the lettuce prorate has been the lack of a uniform program. Due to this, the farming industry in California has been thrown into a constant state of insecurity. New cutting orders are issued weekly. On some occasions cutting orders have been altered or dropped completely in the middle of the week. As a result, a grower whose crop is very susceptible to spoilage is placed in a position where he cannot plan ahead for more than seven days. If the system was uniform, the farmer could plan ahead, and make provisions for possible spoilages or future sales. The lack of uniformity is also illustrated in the way the prorate is policed. A volunteer inspection system has been encouraged. Under this system, farmers are encouraged to inspect the activities of their competitors and if they discover discrepancies to file a complaint. An arrangement such as this can only lead to bad feelings between neighbors and numerous false reports. To be a good inspector one must fully understand the provisions of the prorate and be able to make unbiased judgments as to their enforcement. When individuals who do not fulfill these requirements are urged to make inspections, there cannot possibly be uniform enforcement of the law. If a marketing order is to be economically beneficial there must be uniformity of application and enforcement. California's marketing order has been gravely lacking in uniformity in both these areas, and its economic benefits have been nonexistent.

The marketing order on head lettuce has not decreased the national production of lettuce by any appreciable amount. This is due to its inability to control the volume of lettuce produced in other growing areas. The price of lettuce has not been raised because of the still present oversupply. The prorate has, however, decreased the volume of lettuce produced in California. A California farmer now produces less lettuce but does not receive a correspondingly higher price. Further, due to internal defects in the marketing order itself and a lack of uniformity in its application, a farm can no longer run in an efficient, businesslike manner. Instead of improving the economic condition of the lettuce farmers in California the prorate has only made it worse.

The Court in *Parker v. Brown* associated the economic welfare of the state's raisin growers with the public welfare. Finding that the prorate on raisins was economically beneficial to said farmers, they held that such legislation was for the public welfare. Since it was for the public welfare and just a local problem that could best be handled by state level legislation,

its existence could be constitutionally justified, even though it interfered with interstate commerce.²⁵

Following the same reasoning, however, California's marketing orders on head lettuce are an unjustifiable interference with interstate commerce. Falling lettuce prices and overproduction are not purely local problems, which can best be handled by state level legislation; this is clearly illustrated by the ineffectiveness of California's prorate. Further, no economic benefits have been derived from this marketing order. Therefore, the public welfare has not been provided for. Thus the interference with interstate commerce which is a result of the prorate is unjustified and the marketing order is an undue burden on interstate commerce and unconstitutional.

This legislation cannot be justified on other grounds aside from its economic aspects. It has not furthered the public health and safety. California has always had very high and strictly enforced grading standards on lettuce.²⁶ Under the prorate these standards are merely carried out. Even though the prorate has provisions for the establishment of grading standards, in reality the pre-existing grading scale has merely been adopted.²⁷ It cannot be said that the prorate has in any way furthered the protection of the public health and safety. In some instances the prorate has indirectly endangered public health and safety.

Lettuce during its growing and maturing stages is sprayed with strong insecticides to prevent insect and fungi damage. Some of these insecticides are so deadly that access to the fields is limited for seven days after their application.²⁸ These insecticides retain their killing power from three to twenty-one days, depending upon the mixture.²⁹ Thus lettuce so sprayed cannot be safely harvested until the required period has passed. However, due to the fluctuation in volume control devices, farmers are often put in a position where to fulfill their sales agreements they will have to cut a too recently sprayed field. If there was a uniform standard, the farmer could plan ahead and provide for a proper waiting period. If there was a proper and thorough policing, the farmer would be prevented from cutting such a

²⁵ *Parker v. Brown*, 317 U.S. 341, 362-363 (1943).

²⁶ 3 CAL. ADM. CODE §§ 1436-1436.4.

²⁷ *Marketing Order for Summer Head Lettuce*, art. IV, § B(2): "Any minimum standards of quality shall be based upon the application standards set forth in the Fruit and Vegetable Standardization provisions of the Agricultural Code of the State of California and any other official standards."

²⁸ Parathion and Endrin. When this mixture is applied to a field it can not be entered, except by irrigation men, for seven days.

²⁹ Parathion and Endrin mixture: 21 day staying power. (Applied just before or after thinning.) Parathion and DDE or TDE: 21 day staying power. (Applied before heads have formed.) Malathion and Perthane mixture: seven day staying power. Phosdrin: seventy-two hour staying power (3) days.

field until the necessary time had passed. Thus, the prorate, due to its basically unfunctional nature, has indirectly endangered the public health rather than protected it.

Since California's marketing orders on lettuce are not functional, what are the possible solutions to this problem? There are three possible courses of action. One would be to discontinue the prorate altogether and let farmers compete freely for their economic survival. Under this arrangement no one would be benefited except Mexican farmers who, due to their lower operating expenses, could easily undersell any American producer. Another remedy would be for California and Arizona or California, Arizona and other areas to cooperate with one another.³⁰ A further remedy could be an arrangement similar to the combined California-Arizona prorate on grapefruits. This would be a satisfactory method because it would make possible effective volume control and resulting price stabilization, the absence of which have been the greatest defect in the California prorate. However, the problems of coordination and foreign competition would also have to be solved. If other lettuce growing states do not wish to cooperate with California in this way, they must be willing to face the reality that federal legislation in the area is the only plausible solution.

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³⁰ There are provisions in the marketing order on head lettuce that authorize cooperation with other states to control head lettuce volume. *Marketing Order for Summer Head Lettuce*, art. VIII, § B states: "Insofar as may be possible the administration of this Marketing Order may be coordinated with any other marketing order that may be made effective for lettuce under either State or Federal Statutes, or may be coordinated with either State or Federal marketing orders or agreements for any other commodity."